

**KEE HUAT RADIO CO. LTD. v.
KING YONG TRADING**

[A.C.J. (Mohamed Azmi J.) February 7, 1972]

[Kuala Lumpur — Civil Appeal No. 38 of 1971]

Master and Servant — Sale of goods — Return of goods through salesman — Authority of salesman — Whether expressed or implied, or as servant or agent.

The appellant claimed the sum of \$1,245.20 being the balance of the price for 4 calculating machines sold and delivered to the respondent. The respondent admitted the sale but averred that no sum was due and payable to the appellant by reason of the fact that 4 other machines to the value of \$1,245.20 which were also bought from the appellant and already paid for had been returned to the appellant through its salesman, one Tony Lim, and as such the respondent was entitled to set off the said sum of \$1,245.20 due to it from the appellant against the appellant's claim. On the evidence before him the learned magistrate came to the conclusion that Tony Lim had the authority to accept the return of the four machines, and since their value which gave rise to the set off was equivalent to the sum claimed by the appellant, he dismissed the claim with costs. On appeal,

Held: dismissing the appeal, having regard to the wide powers given by the appellant to Tony Lim in all the dealings with the respondent, the appellant had impliedly held him out as having such authority. Having regard to the nature of the contract, the circumstances of Tony Lim's employment and the business of the appellant, the learned magistrate was right in holding that Tony Lim had authority, expressed or implied, to collect the four machines as servant or agent for or on behalf of the appellant.

Cases referred to:-

(1) *Howard v. Chapman* 172 E.R. 803.

(2) *Leckenby & Anor. v. Wolman* [1921] W.N. 100.

CIVIL APPEAL.

Au Yeong Khuen for the appellant.

Z. Owen for the respondent.

Mohamed Azmi J.: The appellant, who was the plaintiff in the lower court, claimed the sum of \$1,245.20 being the balance of the price of four T.E.C. calculating machines sold and delivered to the respondent. Two of the machines were sold on March 3, 1970 whilst the remaining two were sold on April 4, 1970 at a price of \$745.20 per machine. The respondent having paid \$245.20 to account, there was therefore still an outstanding balance of \$1,245.20 due and payable to the appellant. The respondent admitted the sale of the four calculating machines and the payment of \$245.20, but averred that no sum was due and payable to the appellant by reason of the fact that four other machines to the value of \$1,245.20 which were also bought from the appellant and already paid for had been returned to the appellant through its salesman one Tony Lim between March 13, 1970 and April 2, 1970, and as such the respondent was entitled to set off the said sum of \$1,245.20 due to it from the appellant against the appellant's claim. On the evidence before him, the learned magistrate came to the conclusion that Tony Lim had the authority to accept the return of the four machines, and since their value which gave rise to the set off was equivalent to the sum claimed by the appellant, he dismissed the appellant's claim with costs.

In the memorandum of appeal, the decision of the learned magistrate was attacked on three grounds. However, at the hearing of the appeal, only one ground was pursued, namely, whether the learned magistrate

A erred in law in holding that Tony Lim had authority to collect the four machines as servant or agent for and on behalf of the appellant. For the determination of this question, the law relating to "apparent authority", which was considered by the learned magistrate, is relevant. *Halsbury's Laws of England*, Volume 25, 3rd Edition, paragraph 1010 at page 531 states:

B "Where the servant, whilst acting in the ordinary course of his employment on his master's behalf, makes a contract which falls within the apparent scope of his authority, the master cannot escape liability on the ground that he did not authorise the making of the contract, nor even on the ground that he forbade his servant to make it. All persons dealing with the servant are entitled to assume, unless they have notice to the contrary, that he possesses the authority which it is usual for a servant in his position to possess, and his master, by placing him in that position, impliedly holds him out as having such authority. Where it is sought upon this ground to fix the master with liability upon his servant's contract it is necessary to take into consideration certain matters, namely the nature of the contract, the circumstances of the servant's employment, and the business of the master."

D In this case, as regards the nature of the contract, the circumstances of Tony Lim's employment and the business of the appellant, it was never in dispute that all the transactions in respect of the eight machines (between December 1969 to April 1970) were effected by the respondent through Tony Lim. As admitted in cross-examination by the general sales manager of the appellant (PW2), all dealings with the respondent were done through Tony Lim. As a salesman for the department which dealt with office equipment of the appellant's business, it was conceded that he had authority to take orders, make sales, accept payments and make delivery of the various machines. It was also not in dispute that Tony Lim did receive the return of the four machines from the respondent on behalf of the appellant as evidenced by Exhibits P3, P4 and P5, although the appellant contended that he had no authority to do so. In this case, there was no rebutting evidence to suggest that the four machines returned by the respondent were not defective. It was also significant to note that the first two defective machines bought on February 25, 1970 and March 5, 1970 were returned to Tony Lim on March 13, 1970, and about four days later the respondent was supplied by the appellant with two new machines of the same price and type. Again, when the remaining two defective machines were returned on March 31 and April 2, 1970, the respondent was supplied with two new machines on April 11, 1970, i.e. in less than two weeks. If, as alleged by PW2, Tony Lim had no authority to accept the return of the machines except with the approval of the management, such limitation to his authority had never been brought either directly or indirectly to the knowledge of the respondent. On the contrary, the fact that the respondent was supplied with new machines only four days after the return of the first batch of the defective machines, justified the inference that Tony Lim had the apparent authority to accept the return of defective goods on behalf of his employer. As stated at page 48 paragraph 3 in *Bowstead on Agency*, 12th Edition:

"For a third party who deals with an agent without knowledge of limitations imposed upon his authority by the principal, is entitled to assume that his authority is that which, in the absence of such limitations, is to be inferred from

the circumstances; and the principal is bound, as against the third party, by the acts of the agent within the scope of his authority as it appears to the third party to be."

In the course of his submission, learned counsel for the appellant cited the case of *Howard v. Chapman*⁽¹⁾ and the case of *Leckenby & Anor. v. Wolman*.⁽²⁾ In my view, these two cases are distinguishable from the present case. In *Howard v. Chapman*, the agent accepted horse-hair in lieu of money as payment for a quantity of hemp delivered to the purchaser, and it was held that the agent had no authority to make such a contract on the ground, *inter alia*, that his employer was not dealing in horse-hair. Whereas in the instant case, the goods supplied by Tony Lim and subsequently returned to him due to certain defects were in respect of the same or similar office equipment and there was no dispute that the appellant was dealing in such goods. In *Leckenby & Anor. v. Wolman*, the plaintiffs claimed for the return of the purchase-price of certain furniture from the defendant on the ground that a salesman in the employment of the defendant had agreed to cancel the contract of sale and that they thought that the salesman was the principal and had authority to cancel the contract. It was held by the court that the salesman had no authority to cancel the contract. In the instant case, the facts were entirely different. All the dealings were conducted through Tony Lim at Klang and not at the appellant's shop in Kuala Lumpur. Further, Tony Lim did not cancel any contract as such. What he did was to accept the return of the defective goods and then supplied the respondent with new ones which was necessary and in the interest of the appellant's business, having regard to the nature of the subject matter of the contract. The appellant had the authority to accept the return of goods sold. Having regard to the wide powers given by the appellant to Tony Lim in all the dealings with the respondent, the appellant had impliedly held him out as having such authority, and the learned magistrate quite rightly held that Tony Lim had given the impression to the respondent that he had the authority to collect the machines, and that it was reasonable to infer that such action was within the apparent scope of Tony Lim's authority. Moreover, if he had no such authority, the appellant would certainly have made immediate denial of such authority in its letter dated October 13, 1970 (see Exhibit D8), but instead it demanded the respondent to supply the company with copies of the acknowledgments executed by Tony Lim, to which the respondent had complied. It was unfortunate in this case that Tony Lim could not be called as a witness. However, having regard to the nature of the contract, the circumstances of Tony Lim's employment and the business of the appellant, I found the learned magistrate did not err in law in holding that Tony Lim had the authority, express or implied, to collect the four machines as servant or agent for or on behalf of the appellant.

The appeal was accordingly dismissed with costs.

Appeal dismissed.

Solicitors: Lovelace & Hastings; Chin & Fernandez.

A NANYANG DEVELOPMENT (1966) SDN. BHD. v. MALAYSIAN ARMED FORCES CO-OPERATIVE HOUSING SOCIETY LTD.

[F.C. (Suffian, Gill & Ong Hock Sim F.J.J.) May 4, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 1 of 1972]

Practice and Procedure — Attachment before judgment — Intent to obstruct or delay judgment — Debtors Ordinance, 1957, s. 19(1)(c) — Courts of Judicature Act, 1964, ss. 69(4) & 72 — Defect in order — Curable by appellate court.

This was an appeal against the judgment of Mohamed Azmi J. ([1972] 2 M.L.J. 6) in which he dismissed the application of the defendant-appellants to set aside an earlier order made *ex parte* by him, for the attachment before judgment of certain properties of the defendant/appellants. It was argued on appeal that the learned judge erred in law in drawing the inference from the evidence in the case as regards the intent to obstruct or delay the execution of the judgment.

Held, dismissing the appeal: (1) there was ample evidence before the learned judge to justify him making the *ex parte* order which he made on December 3, 1971. That order could only be set aside if it could be shown that the plaintiffs had suppressed any material facts in obtaining it and this had not been shown by the appellants;

(2) the order made was however defective as it provided for an order in the alternative but the appellate court could set right the defect under sections 69(4) and 72 of the Courts of Judicature Act, 1964. The order would be amended by deleting that part of it which relates to the attachment before judgment of a sum of not less than \$1 million being part of the proceeds of sale of the defendant's land, so that the attachment before judgment will be confined to the attachment of the lands themselves.

Cases referred to:-

- (1) *Kepong Prospecting Ltd. v. Schmidt* [1962] M.L.J. 375, 377.
- (2) *Kanshi Ram v. Hindustan National Bank Ltd.* A.I.R. 1928 Lahore 376.
- (3) *Chandrika Prashad Singh v. Hira Lal* A.I.R. 1924 Patna 312.
- (4) *Bishamberdas & Co. v. Sachoomal Kotoomal* A.I.R. 1941 Sind 178.
- (5) *Durga Das Das v. Nalin Chandra* A.I.R. 1934 Cal. 694.
- (6) *R. v. Kensington Income Tax Commissioners* [1917] 1 K.B. 486, 504.
- (7) *Golding v. Wharton Saltworks Company* [1875-6] 1 Q.B.D. 374.
- (8) *Watson v. Rodwell* [1876] 3 Ch. 380.
- (9) *Evans v. Bartlam* [1937] 2 All E.R. 646.
- (10) *Grimshaw v. Dunbar* [1953] 1 All E.R. 350, 353.

FEDERAL COURT.

Lim Kean Chye (Wong Soon Foh with him) for the appellants.

H Raja Abdul Aziz bin Addruse (Ariff Wan Hamzah with him) for the respondents.

Gill F.J.J.: This is an appeal from the refusal of Mohamed Azmi J. on December 28, 1971 to set aside his earlier order of December 3, 1971 which he had made on the *ex parte* application of the respondents, who are the plaintiffs in Civil Suit No. 807/1971 in the High Court at Kuala Lumpur, for the attachment before judgment of certain properties of the appellants, the defendants in the suit.

The suit was commenced by a specially indorsed writ issued on September 30, 1971. The claim in the action was for a sum of \$1,069,423.35 being the amount alleged to be due to the plaintiffs as on October 1, 1971